Applicants : Cheree L. B. Stevens et al.
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REMARKS

As per the telephone conversation between Mr. Todd Van Thomme and the Examiner on January 5, 2006, Applicants have elected with traverse to prosecute Group I, claims 1-23 and 35-42. Accordingly, claims 24-34 have been cancelled. Applicants have also amended claim 3 to require that the pastry product comprise a low moisture content dough. Support for this amendment can be found in paragraph **[0012]** of the originally filed application.

In the Office Action mailed January 26, 2006, the Examiner rejected claims 1 and 16 under 35 U.S.C. §112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which Applicants regard as the invention. The Examiner stated that there is insufficient antecedent basis for the limitation "toaster pastry product" in claims 1 and 16. Accordingly, Applicants have deleted "toaster" from the claim so that claims 1 and 16 recite a "pastry product."

The Examiner also rejected claim 1 under 35 U.S.C. §102(b) as being clearly anticipated by United States Patent No. 4,504,502 to Earle et al. The Examiner asserted that the '502 patent "discloses of [sic] a composition comprising a pastry product at least partially coated with a film (i.e. a substantially clear coating composition) comprising a starch component wherein the composition provides at least a partial moisture barrier on the pastry product."

"A claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference." *Verdegaal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631 (Fed. Cir. 1987); MPEP 2131. Applicants respectfully submit that the Examiner has not shown that the '502 patent discloses a "substantially clear coating composition," which is one of the elements in claim 1. The

Examiner's statement that the substrate is "at least partially coated with a film" does not mean that the coating is "substantially clear." In this regard, Applicants respectfully submit that the coating composition disclosed in the '502 patent does not disclose a "substantially clear coating composition." Earle et al. essentially disclose a two-stage process to form a film on a food product. The first stage as discussed in column 4 is to apply an algin solution that may contain an edible filler and/or carrier material. Algin is a hydrocolloid compound that will not form a film without the addition of calcium. (See Exhibit 1, http://www.ispcorp.com/products/food/content/brochure/alginates/reaction.html). In fact, this is further evidenced by the '502 patent itself, which requires a gelling agent to be added. The specific gelling agents listed are, in fact, calcium ion containing compounds, in particular calcium chloride and calcium lactate. (See '502 patent, column 4 lines 42-45). Both calcium chloride and calcium lactate when mixed with water are cloudy. These calcium compounds also have very low solubility. Additionally, the '502 patent at column 4 line 16 disclose using an "edible filler," which will further impede the solubility of the calcium ion compounds. Furthermore, because the calcium components are applied as a component of a dry gelling mixture (see '502 patent, column 4 lines 46-48), they will be even less likely to dissolve and will be visible in the final coating. Accordingly, for at least the above reasons, the calcium components of the '502 patent, which are necessary to form a film, will make the film visible on the food substrate. Therefore, Applicants respectfully request the Examiner to withdraw this rejection.

The Examiner also rejected claims 1, 3-7, 11, 14, 17, 18 and 22 under 35 U.S.C. §103(a) as being unpatentable over United States Patent No. 3,723,132 to Hodge and in view of WO 94/21143 to Baur et al. The Examiner asserted that:

> It would have been obvious to one skilled in the art at the time the invention was made to have had about 50% water mixed with a composition consisting of 5-50% wheat flour, 5-50% modified corn starch, about 2-20% dextrin, about 0.1-3.5% sodium acid pyrophosphate, and optional flavorings to form a clear texture preserving coating to be applied to a pastry at about 55F as recited in claims 1, 3-7, 11, 14, 17, 18, and 22 in view of Baur on the texture preserved fried pastry product as disclosed by Hodge.

Under MPEP 2142, in order to establish a *prima facie* case of obviousness, the Examiner must provide: (1) some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the references or to combine references teachings, (2) a reasonable expectation of success, and (3) the prior art reference (or references when combined) must teach or suggest all the claim limitations.

Applicants respectfully assert that the pending claims would not have been obvious in view of the combined references for various reasons. First, Applicants respectfully submit that the references do not include a suggestion or motivation to combine their teachings to obtain the claimed invention. The '132 patent teaches to retard the staling of a fried pastry product by integrating two additional ingredients, specifically waxy corn starch and sodium stearyl-2-lactylate, into the actual product. Applicants respectfully submit that, if anything, the '132 patent teaches one to integrate ingredients into the substrate rather than apply them to the outside surface of the substrate.

Second, the '143 reference does not specifically disclose that the glaze can be applied to a pastry product. Moreover, even if one having ordinary skill in the art had attempted to apply the

'143 coating to the pastry product disclosed in the '132 patent, the coating would not successfully adhere. A review of the specification of the '143 reference shows that wheat flour is included as the first essential component of the glaze composition.[1] As stated in the Declaration of John Stevens, the wheat flour component of the composition prevents the successful adherence of the coating to a wheat-based dough substrate, such as a pastry product. (Decl. of Stevens, ¶ 9). Wheat flour-containing coatings, such as those described in the '143 reference, may form a substantially clear coating on a french fry, but do not necessarily do so on other substrates. In fact, wheat flour containing coatings, when applied to a wheat-based dough substrate, create a flaky, raised, and visible coating, i.e. not a substantially clear coating. (Decl. of Stevens, ¶ 10).

Furthermore, Applicants respectfully submit that the '143 reference teaches away from the presently claimed products and certainly teaches one of ordinary skill away from the removal of wheat flour as a component of the glaze since, as discussed above, it unequivocally discloses that the wheat flour is essential to the composition. Accordingly, for at least the aforementioned reasons, there would not have been a motivation to combine the '143 coating to the '132 pastry product to obtain the claimed invention and, even if combined the combination will not yield the presently claimed invention. Applicants respectfully apply these same arguments to all of the Examiner's rejections regarding the combinations based upon the '132 patent and the '143 reference.

The Examiner also rejected claims 2, 8, 9 and 19 under 35 U.S.C. §103(a) as being

[1]The Baur et al. reference discloses wheat flour as the first component of the composition. (Baur, p. 2, lines 27-28). The next paragraph states that a combination of modified starch is the "next essential component." (Baur, p. 3, lines 1-4). It logically follows that wheat flour is the first essential component of the composition since the modified starch combination is disclosed as the "next essential component" and the wheat flour is the only component listedbefore the starch.

unpatentable over the '132 patent and in view of the '143 reference as applied to claims 1, 3-7, 11, 14, 17, 18 and 22 above and in view of LrdRas (http://www.florilegium.org/files/FOOD-BREADS/flour-msg.html).

Applicants respectfully submit that the Examiner has not carried the burden to show that it would have been obvious to one skilled in the art at the time the invention was made to substitute the modified corn starch for the modified wheat starch as taught by LrdRas. First, the Examiner has not established that LrdRas is prior art to the pending application, since September 4, 1998 appears to be the date in which the comment was submitted to the author, but it does not actually prove that the website was published on that date.

Second, Applicant could not find any teaching in LrdRas regarding the substitution of modified starches. Even assuming that the Examiner's comments regarding the equivalence of wheat starch and corn starch were true, the Examiner has not shown why LrdRas would teach one having ordinary skill in the art would have substituted modified corn starch for modified wheat starch.

Third, Applicants respectfully assert that LrdRas does not provide reliable information as to what would have been obvious to one having ordinary skill in the art at the time of the application filing date. Applicants have found more reliable references that rebut the alleged teachings of LrdRas, which demonstrate the different properties of corn starch and wheat starch. For example, Exhibit 2, http://food.oregonstate.edu/starch/lecture.html (Starch Gelatinization Website) demonstrates the different rates of heating of the two starches (i.e. wheat starch heats faster than corn starch) and the differences in viscosity (i.e. wheat starch/water dispersions are less viscous than those same dispersions made with corn starch). At least these different

properties of the wheat starch and corn starch demonstrates that they would react differently in different chemical compositions and/or would therefore not be "known equivalents."

Furthermore, the fact that wheat starch dispersions are less viscous than those made with corn starch teaches away from utilizing wheat starch as a corn starch substitute since the decreased viscosity of the wheat starch would provide a less sticky coating, and therefore be less adherent, than the same coating containing corn starch. Applicants also assert that the Starch Gelatinization Website, as opposed to LrdRas, is a reference which is more likely to indicate the knowledge of those having skill in the art. The Starch Gelatinization Website is a scholarly article whereas the LrdRas is not from a scholarly source and there is no proof that its author has any skill in the art.

The Examiner also rejected claim 16 under U.S.C. §103(a) as being unpatentable over the '132 patent in view of the '143 reference and in view of LrdRas and in view of U.S. Pat. No. 5,976,607 to Higgins et al. The Examiner stated that "Higgins teaches that a starch and dextrin containing coating should be applied to the substrate in the amount of 20-90%," which the Examiner interpreted as making it obvious "to include 20-90% pick up on the edible substrate in view of Higgins."

Applicants assert that the Examiner has incorrectly interpreted the disclosure of the '607 patent since the '607 patent does not disclose that 20-90% of the coating would be picked-up on the substrate. Instead, the '607 patent states that the coating composition is present in a level of 20 to 90 weight percent in an aqueous medium, of which the total dispersion (containing both the coating composition and the aqueous medium) is subsequently applied to a substrate. The Examiner does not cite to any portion of the '607 patent which discloses the amount of pick-up

that actually remains on the substrate. Accordingly, Applicants respectfully submit that the Examiner has not shown that each limitation is taught or suggested in the combined references, as required by MPEP 2142. And even if the Examiner has established a *prima facie* case of obviousness, Applicants further assert that claim 16 is not obvious in view of these references for the same reasons discussed above regarding the other three references of this rejection that form the Examiner's basis for the rejection of claim 16. Applicants also reassert these arguments for all other rejections based on the '607 patent.

The Examiner also rejected claims 7, 10, 15, 17, 20 and 23 under 35 U.S.C. §103(a) as being patentable over the following five references: the '132 patent in view of the '143 reference and in view of LrdRas and in view of the '607 patent as in view of U.S. Pat. No. 5,439,697 to Gonzalez-Sanz. The Examiner stated that "it would have been obvious to...have modified the coating composition as disclosed by modifying Hodge to include a sweetener in view of Sanz" and also stated that "it would have been obvious...to have modified the coating composition as disclosed by Hodge to include a chemically or physically modified starch in view of Sanz."

Applicants respectfully submit the Examiner in this and all of the earlier obviousness rejections is using impermissible hindsight to combine the teachings of these references to produce the claimed invention. MPEP 2142. The low-fat spreadable composition taught in the '697 patent is not a "substantially clear coating composition", as required by the pending claims. In fact, it is a frosting. Since the composition in the '697 patent is not "substantially clear," Applicants submit that there is no teaching or suggestion in the '697 patent as to which components of the spreadable composition would be suitable for a "substantially clear coating." Accordingly, Applicants respectfully assert these claims are not obvious in view of the fact that

one having ordinary skill in the art would not have combined these references to obtain the pending claims. Applicants also reassert these arguments for all other rejections based on the '697 patent.

The Examiner also rejected claims 12, 13 and 21 under 35 U.S.C. §103(a) as being patentable over the combination of the following six references: the '132 patent in view of the '143 reference and in view of LrdRas and in view of the '607 patent, and in view of the '697 patent as applied to the above-mentioned claims and in view of U.S. Patent No. 4,510,166 to Lenchin et al. The Examiner stated that "[i]t would have been obvious...to include any specific type and amount of dextrin at any solubility level in the invention as taught by Hodge and in view of Lenchin."

Applicants respectfully assert that the Examiner has used impermissible hindsight and has impermissibly decided to pick and choose from various references to obtain the claims of the pending application. "It is impermissible within the framework of Section 103 to pick and choose from any one reference only so much as will support a given position, to the exclusion of other parts necessary to the full appreciation of what such reference barely suggests to one of ordinary skill in the art." *In re Hedges*, 783 F.2d 1038, 1041 (Fed. Cir. 1986). Applicants respectfully assert that the Examiner has cited that the '166 patent for its disclosure of dextrin, but did not consider the reference as a whole. The '166 patent does not disclose a "substantially clear coating composition," and instead, it specifically discloses water and converted starches that form gels, which are fat and/or oil replacements in various foodstuffs (including icings). The '166 patent further states that the icing produced would be "creamy." The Examiner did not point to any teaching or suggestion in the reference that would indicate which type of dextrin at

which type of solubility would be a suitable in a substantially clear coating composition that would be suitable for use on the presently claimed pastry products. Accordingly, one having ordinary skill in the art would not have combined the '166 patent with the other references cited by the Examiner in order to create the present invention. Moreover, there has been no showing of a motivation to combine any teaching in the '166 patent with any of the other five references where the references support a reasonable expectation of success of this combination. Applicants also reassert these arguments for all other rejections based on the '166 patent.

Finally, the Examiner provisionally rejected various claims on the grounds of non-statutory obviousness-type double-patenting. Applicants respectfully traverse these rejections and will wait to address them in a later response, since this rejection may be later withdrawn if this application issues before the cited applications under MPEP §804.

The Applicants have made an effort to place the present application in condition for allowance, and a notice to this effect is earnestly solicited. In the event there are any remaining formalities or other issues needing Applicants' assistance, Applicants request the Examiner to call the undersigned attorney.

Respectfully submitted,

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Date

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